SUPREME COURT, U. S.

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In The Supreme Court of the United States

October Term, 1974

No. 74-570

HERBERT H. DEAN,

Petitioner

vs.

FORD MOTOR COMPANY

Respondent

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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JURISDICTION

On August 13, 1974 the United States Court of Appeals for the Ninth Circuit made and entered its order affirming the judgment of the United States District Court for the Northern District of California, made in open court on September 25, 1973, against petitioner and for defendant Ford Motor Company. The opinion of the United States District Court, as excerpted from the Reporter's Transcript of September 25, 1973, and the opinion of the United States Court of Appeals for the Ninth Circuit are set out in the appendix affixed hereto.

The judgment of the United States Court of Appeals for the Ninth Circuit is now final for all purposes, no petition for rehearing having been filed. The statutory provisions conferring jurisdiction upon this Court to review the judgment of the United States Court of Appeals for the Ninth Circuit are as follows: 28 U.S.C. Section 1254; 28 U.S.C. Rule 19.

REASONS FOR ALLOWANCE OF THE WRIT

In *Monroe* v. *Pape* (1961) 365 U.S. 167, this Court granted a Writ of Certiorari in an action for violation of the federal Civil Rights Act, Section 1983 of Title 42, because of a seeming conflict in the Court of Appeals ruling affirming dismissal of the Complaint with the Supreme Court's prior cases (28 U.S.C. Rule 19). Petitioner herein alleges the same grounds for allowance of the Writ in his petition, in that the Court of Appeals' ruling affirming the District Courts' judgment for respondent herein, dismissing petitioner's complaint against respondent for violation of Title VII of the

1964 Civil Rights Act (42 U.S.C. 2000-e through 2000-e-17), is in seeming conflict with this Court's ruling and opinion in *McDonnell Douglas Corporation* v. *Green*, (1973) 93 Sup. Ct. 1817.

QUESTION PRESENTED FOR REVIEW

The question presented here for review is:

In deciding whether or not a plaintiff has presented a prima facie case under the procedure enunciated in *McDonnell Douglas* for the order and allocation of proof in a private, single-plaintiff action challenging employment discrimination, may the Court consider the evidence presented by defendant after the completion of plaintiff's case in chief?

FACTS OF THE CASE

The essential facts of the case and grounds for federal jurisdiction are set out in the complaint affixed hereto as an appendix. Petitioner is a Negro and was employed at its San Jose Plant from July 25, 1966 to January 11, 1972. Petitioner alleged that, during said period of time, he made application for promotion to foreman and that he, and others he sought to represent, were denied promotion by respondent because of racial discrimination. Respondent denied that petitioner made application for promotion and denied that promotion was denied because of racial discrimination.

The District Court and the Court of Appeals both agreed with petitioner that the case should be governed by the rule of *McDonnell Douglas, supra.*

The evidence presented by the petitioner during his case in chief at trial was not contradicted during cross-

examination, redirect or re-cross-examination. The testimony was that: 1) Petitioner belongs to a racial minority; 2) that he applied for and was qualified for a job for which the employer was seeking applicants; 3) that despite his qualifications he was rejected; and 4) after his rejection the position remained open and the employer continued to seek applicants from persons of the complainant's qualifications. (See *McDonnell Douglas, supra,* page 1824). Petitioner also presented during his case in chief and on rebuttal statistics and other evidence tending to show discriminatory employment practices on the part of respondent regarding Negroes.

Respondent, during the presentation of its case, presented evidence tending to refute petitioner's evidence that he applied for and was qualified for promotion to foreman.

The District Court in its opinion concluding that petitioner had not made a prima facie showing that he had applied and was qualified for the job of foreman, admitted that it had relied on rebuttal evidence presented *by respondent after petitioner had concluded his case in chief.*

The Court of Appeals stated in its opinion affirming the District Court's ruling: " . . . the district court properly considered the evidence of both parties in determing whether plaintiff had sustained his initial burden of proving a prima facie case of racial discrimination in employment." (See Appendix B.)

ARGUMENT

A. UNDER THE PROCEDURE FOR TRIAL LAID OUT IN *McDONNELL DOUGLAS* CONCERNING THE ORDER AND ALLOCATION OF PROOF IN A PRIVATE, SINGLE-PLAINTIFF ACTION CHALLENGING EMPLOYMENT DISCRIMINATION, IF A PLAINTIFF PROVIDES THE COURT WITH COMPETENT EVIDENCE SUFFICIENT TO ESTABLISH THE FOUR CRITERIA OF *McDONNELL DOUGLAS* IN HIS CASE IN CHIEF, HE HAS ESTABLISHED A PRIMA FACIE CASE OF EMPLOYMENT DISCRIMINATION.

By the direct testimony of plaintiff and other witnesses, plaintiff provided the Court in his case in chief with competent evidence that he had applied and was qualified for the job of foreman. In California, except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact (California Evidence Code Section 411. Also, in California, generally the uncontradicted testimony of a witness to a particular fact may not be disregarded but should be accepted as proof of the fact (*Joseph* v. *Drew*, 1951, 36 Cal. 2d 575).

With such evidence as plaintiff presented in his case in chief, the District Court should have found that plaintiff had made a prima facie showing that he had applied and was qualified for promotion to foreman. Black's Law Dictionary, Revised (Fourth Edition, West's Publishing Company), defines a prima facie case as "such as will suffice until contradicted and overcome by other evidence." A statement of the law regarding a prima facie case may be found in *Frank Meline Company* v. *Kleinberger*, 108 C.A. 60, wherein the Court stated that "a prima facie case is one which is

established by evidence and can be overthrown only by rebutting evidence adduced on the other side" (*supra*, at p. 63).

A finding that plaintiff had established a prima facie case at the end of his case in chief would have shifted the burden of p. of to respondent to "articulate some legitimate, non-discriminatory reason for plaintiff's rejection" (*McDonnell Douglas*, *supra*, at 1824) such as that plaintiff had *not* applied or was *not* qualified for promotion to foreman.

If respondent successfully rebuts plaintiff's prima facie case, under the *McDonnell Douglas* (*supra*, at 1825) "the inquiry must not end there." Rather, the plaintiff must then be allowed to present evidence that the rebuttal of the defendant was pretextual," that is, just a cover-up for racially discriminatory employment practices. The plaintiff may do this by 1) a showing of statistics, 2) a general showing of a pattern of discrimination and, 3) showing that the defendant treated whites differently from minorities in their promotional employment practices (*McDonnell Douglas*, *supra*, at 1825).

In the present case, petitioner made a showing of statistics, a general showing of a pattern of discrimination *and* a showing that the respondent treated whites differently from minorities in their promotional practices both in his case in chief and in rebuttal to respondent's case. However, the trial court refused to consider such evidence and specifically stated that it did not feel it needed to consider statistics nor the other evidence presented when it found the second element of plaintiff's prima facie case to be rebutted. (See Appendix A.) The Court of Appeals agreed. Such a hold-

ing and reasoning are clearly in conflict with this Court's ruling in *McDonnell Douglas* if the plain words of that case are to have the clear meaning ordinarily given to them.

CONCLUSION

In this time of celebration of the Bicentennial of the birth of our nation we are still trying to achieve the great hopes our Constitution holds out for all the world, one of which is equality of opportunity for all. The gains in the direction of equal opportunity for all have been slowly and often painfully achieved in the face of strong and continued opposition. The decision in *Brown* v. *Board of Education*, 347 U.S. 483 did not come quickly or easily to our land. It took Congress 100 years after the end of the Civil War to pass the Civil Rights Act of 1964 prohibiting racial discrimination in employment practces. Yet equal employment opportunity is still only a hope or a goal in many sectors of our economy.

This Supreme Court correctly realized in *McDonnell Douglas* that racial discrimination, though it exists, is often difficult to prove: employers usually have greater resources at their disposal to rebut accusations of racial discrimination than does the individual plaintiff to prove racial discrimination. Accordingly, not only this Court but other federal courts as well, have given great leeway to the Title VII plaintiff in allowing him to employ statistics and give other indirect evidence of discrimination in order to prove he, individually, was unlawfully discriminated against.

The often cited aphorism (*U.S.* v. *Ironworkers Local No. 6*, 443 F2d 544), "statistics often tell much and the

courts listen," is a firmly entrenched judicial maxim regarding Title VII cases that should not be ignored. A prima facie case of discrimination may even be established on the basis of statistics alone. (*Stamps* v. *Detroit Edison Company*, (1973) 365 F. Supp. 87; *James* v. *Leeway Motor Freight, Inc.*, 431 F 2d 245, *U.S.* v. *Sheet Metal Workers, International Local Union 36*, 416 F 2d 123.)

Yet the District Court and the Court of Appeals in the present case found statistics and other evidence of discrimination irrelevant to the presentation of petitioner's case. The gains toward equal employment opportunity that have been achieved in our country at so great cost and effort should not now be allowed to be thrown aside, disregarded and ignored by any federal Court.

The opinions of the lower courts in this case not only conflict with the clear words of *McDonnell-Douglas*, but also with the spirit and policy behind that case, as well as with the intent of Congress in enacting the 1964 Civil Rights Act.

The judgment below should be reversed.

Respectfully submitted,

Dated, Sacramento, California,
October 29, 1974.

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